UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12

SERCO MANAGEMENT SERVICES, INC.
d/b/a SERCO MANAGEMENT, INC.

Employer[1]

and

Case 12-RD-973

RICHARD Q. DUNCAN, JR.

Petitioner

and

PROFESSIONAL AIR TRAFFIC
CONTROLLERS ORGANIZATION, (PATCO)
FPD, NUHHCE, AFSCME, AFL-CIO

Union[2]

DECISION AND DIRECTION OF ELECTION

The Employer, SERCO Management Services, Inc. d/b/a SERCO Management, Inc. provides weather observation services at the Tallahassee, Florida airport weather station where it employs seven employees. The Employer provides these services pursuant to a contract with the Federal Aviation Administration (FAA). The Petitioner, Richard Q. Duncan Jr., filed a petition on May 24, 2004, and an amended petition on June 2, 2004, with the National Labor Relations Board, under Section 9(c) of the National Labor Relations Act, seeking a decertification election in a unit of all full-time and part-time weather observers employed by the Employer at its Tallahassee weather station. The Petitioner asserts that the Union, the Professional Air Traffic Controllers Organization, (PATCO) FPD, NUHHCE, AFSCME, AFL-CIO, currently recognized by

[1] The Employer's name appears as amended at hearing.
[2] The Union's name appears as amended at hearing.

the Employer, no longer represents the unit pursuant to Section 9(a) of the Act. A hearing officer of the Board held a hearing, and the parties were given an opportunity to file briefs with me.[3]

As evidenced at the hearing and in the Employer's brief, the main issues in this case are: (1) whether the petition to decertify the Union is barred by the collective bargaining agreement between SERCO's predecessor, IBEX, and the Union; (2) whether the petition is barred based upon SERCO's recognition of the Union; (3) whether the petition is barred by the collective-bargaining agreement between SERCO and the Union; and (4) whether the Senior Weather Observer (SWO)[4] should be excluded from the unit because he is a statutory supervisor.[5]

The Union contends that a decertification election should not be conducted because its contract with the Employer's predecessor, IBEX , presents a contract bar, or in the alternative, its contract with the Employer presents a contract bar. The Petitioner and the Employer contend that neither of the two contracts presents a bar to this petition because the IBEX contract was not assumed by Employer, and because the SERCO agreement did not become effective until after the petition was filed. The Employer also contends that, as a successor employer, its recognition of the Union is not a bar under the recognition bar doctrine. The Employer, contrary to the Union, further argues that the SWO should be excluded from the unit because he is a statutory supervisor. The Petitioner did not take a position on the supervisory issue.

---

[3] The Employer was the only party that filed a brief.
[4] The SWO is also referred to as the Contract Weather Observer Supervisor.
[5] The supervisory status of a senior weather observer was one of the issues raised in SERCO Management Services, Inc. d/b/a SERCO Management, Inc., Case 12 RM-391, involving the Ft. Lauderdale weather station. On October 10, 2003, a Decision and Direction of Election issued in Case 12-RM-391, in which it was concluded that the senior weather observer at the Ft. Lauderdale facility was not a statutory supervisor. The Employer filed a Request for Review on October 30, 2003, which was denied by the Board on November 13, 2003.

The unit the Employer contends is appropriate has six employees, while the unit the Union contends is appropriate includes seven employees.

I have considered the evidence and the arguments presented by the parties on each of the issues. As discussed below, I have concluded that there is no contract or recognition bar to the petition that was timely filed. I have also concluded that the senior weather observer is not a statutory supervisor and should be included in the bargaining unit. Accordingly, I have directed an election in a unit that consists of seven employees.

To provide a context for my discussion of the issues, I will first provide the relevant factual background in this case. Then I will present in detail the facts and reasoning that support each of my conclusions on the issues.

I. RELEVANT FACTUAL BACKGROUND

As noted above, the Employer provides aviation weather observation services to airports pursuant to contracts with the FAA. These weather observation services are provided 24 hours a day, 7 days a week. At the time of the hearing, the Employer provided weather observation services at 14 airports in the United States.

On November 28, 2002, pursuant to a bidding process, the FAA awarded the Employer the contract for the performance of weather observation at the Tallahassee, Florida airport weather station. In September 2003, the Employer started the hiring process and hired all of the incumbent employees at the Tallahassee weather station. The Employer took over the physical operation of the weather station at the Tallahassee Airport on October 1, 2003.

The Employer's predecessor at the Tallahassee airport weather station was IBEX. The Union represented IBEX's weather observers. The Union and IBEX had entered into

a collective-bargaining agreement effective by its terms from June 1, 2000, to May 31, 2005.

The Employer did not assume the contract between the Union and IBEX. Instead, the Employer and the Union began to negotiate for a labor agreement for the Tallahassee weather observers. They met for the first time on December 2, 2003. Jeff Yarris, the Employer's labor negotiator and Weather Contract Manager, was responsible for developing contract proposals for the Employer.

While negotiations were ongoing, the economic provisions from the IBEX agreement continued in effect, as required by the Service Contract Act, 41 U.S.C. Sections 351, et seq. and its regulations, 29 CFR part 4.

The Union and the Employer reached a collective-bargaining agreement.[6] The Union executed the agreement on April 26, 2004, and the Employer executed the agreement on April 22, 2004. The agreement provides that it is effective by its terms from June 1, 2004, through December 31, 2007. The Employer contends that the gap between the signing date and the effective date was because the agreement had to be submitted to the FAA and because the Employer needed time to make administrative changes within the corporate office.

II. QUESTION CONCERNING REPRESENTATION

Before addressing the specific issues presented in this case, I will briefly review the standard for processing decertification petitions. Next, I will set forth the successor bar and contract bar doctrines. I will then further describe the Union's claims that the petition is barred and the Employer's argument for finding otherwise.

---

[6] It is noted that the Union's name on its contract with IBEX (PATCO, NUHHCE AND AFSCME, AFL-CIO) differs from the name on its contract with SERCO (PATCO).

A. Case Law

1. Standard for RD Petitions

If an employee, group of employees, individual, or labor organization files a timely decertification petition supported by the appropriate showing of interest asserting that the currently certified or recognized bargaining representative no longer represents the employees in the bargaining unit, the Region will conduct an election under Section 9(c)(1)(B) of the Act.

When a petition is amended, and the employer and the operations or employees involved were contemplated under the original petition, and the amendment does not substantially enlarge the character or size of the unit or the number of employees covered, the filing date of the original petition is controlling. Deluxe Metal Furniture Co., 121 NLRB 995, 1000 fn. 2 (1958).

2. Successorship Doctrine

In NLRB v. Burns International Services, Inc., 406 U.S. 272 (1972), the Supreme Court, approving the Board's determination, stated that a "successor employer" has the obligation to recognize and bargain with the bargaining representative of the predecessor's employees. Burns, supra, at 291. The standard for a "successor employer" is an employer which 1) assumes the operations of another employer while maintaining substantial continuity with the predecessor's operations, and 2) hires as a majority of its workforce the employees of the predecessor employer. Id. The Supreme Court also stated that the successor employer is generally not obligated to adopt the terms of the collective-bargaining agreement between the predecessor and the union. Id.

An incumbent union is entitled only to a rebuttable presumption of continuing majority status that will not bar an otherwise valid successor employer petition or other valid challenge to a union's majority status. MV Transportation, 337 NLRB 770, 773 (2002), citing Southern Moldings, 219 NLRB 119 (1975). In MV Transportation, the Board overruled St. Elizabeth Manor, Inc., 329 NLRB 341 (1999), a case in which the Board had established the "successor bar doctrine." MV Transportation, supra, at 770. Under the successor bar doctrine, a successor employer was required to bargain with an incumbent union for a reasonable period of time before any challenge to the union's majority status through a decertification petition, employer petition, or a rival union petition. St. Elizabeth Manor, supra, at 341.

In overruling St. Elizabeth Manor, the Board noted its obligation to strike a balance when conflicts arose between the two fundamental purposes of the Act: (1) "the protection and promotion of employee freedom of choice" and (2) "the preservation of the stability of bargaining relationships." MV Transportation, supra, at 772. The Board struck this balance in favor of employee free choice noting that the successor bar doctrine articulated in St. Elizabeth Manor would, in some circumstances, potentially prohibit the employees from selecting a bargaining representative for several years. MV Transportation, supra, at 773. The Board in MV Transportation also disagreed with the notion that because employees may be in a state of anxiety about the instability in a successorship situation, they are unable to make a decision regarding union representation. Rather, the Board noted that in such an environment, the employees might value their bargaining representative more fervently. Id. at 775.

3. Contract Bar Doctrine

When the circumstances are appropriate, the existence of a collective-bargaining agreement will preclude, or bar, a Board representation election involving employees covered by the contract. The Board's contract-bar doctrine is intended to achieve "a finer balance between the statutory policies of stability in labor relations and the exercise of free choice in the selection or change of bargaining representative." Direct Press Modern Litho, Inc., 328 NLRB 860 (1999), citing Appalachian Shale Products Co., 121 NLRB 1160, 1161 (1958). Its "fundamental premise [is] that the postponement of employees' opportunity to select representatives can be justified only if the statutory objective of encouraging and protecting industrial stability is effectuated thereby." Pacific Coast Assn. of Pulp & Paper Mfrs., 121 NLRB 990, 994 (1958). Thus, in general, the doctrine's dual rationale is to permit the employer, the employees' chosen collective-bargaining representative, and the employees, a reasonable, uninterrupted period of collective-bargaining stability, while also permitting the employees, at reasonable times, to change their bargaining representative, if that is their desire.

The Board's contract-bar doctrine generally prohibits the filing of election petitions during the term of a collective-bargaining agreement. Hexton Furniture Co., 111 NLRB 342 (1955). A contract does not bar an election if a petition is filed with the Board before the effective date of the contract, where the contract becomes effective at some time after its execution. National Broadcasting Co., 104 NLRB 587 (1953); DeSoto Creamery and Produce Company, 94 NLRB 1627 (1951).

B. Analysis

At the outset, I find that the instant petition is timely and that the Petitioner has established that a question concerning representation exists warranting an election to determine whether a majority of the employees no longer wish to be represented by the Union. In reaching this conclusion, I find that the Employer meets the definition of a successor employer, with the concomitant obligation to recognize and bargain with the bargaining representative of the predecessor's employees under NLRB v. Burns International Services, Inc., 406 U.S. 272 (1972). Under such circumstances, an incumbent union is entitled only to a rebuttable presumption of majority status that will not bar a valid decertification, rival union or employer petition, or other valid challenge to the union's majority status. MV Transportation, 337 NLRB 770 (2002). Thus, in the present case, I shall proceed to direct an election. The evidence establishes that the Employer did not adopt its predecessor's collective bargaining agreement, nor did the Union ask the Employer to adopt it. Further, the contract that the Employer negotiated with the Union also does not bar the petition because the petition was filed prior to the effective date of the contract.

1. Contract Bar Doctrine Applied to IBEX/PATCO CONTRACT

The Employer is a successor employer since it took over the operations of IBEX while it maintained continuity of operations and hired all of its employees. As such, the Employer was not obligated to assume the IBEX/PATCO collective-bargaining agreement . Burns, supra, at 291. Furthermore, the Employer, in fact, opted not to

assume its predecessor's agreement and instead Jeff Yarris and Jerry Tuso commenced to negotiate a new agreement.[7]

The assumption of the operations by a purchaser in good faith, who had not bound itself to assume the bargaining agreement of the prior owner of the establishment, removes the contract as a bar. General Extrusion Co., 121 NLRB 1165, 1168 (1958). If the successor does decide to assume its predecessor's contract, the Board has required that, for contract-bar purposes, such an assumption of a prior contract by a new employer must be express and in writing. M.V. Dominator, 162 NLRB 1514, 1516 (1967); American Concrete Pipe of Hawaii, 128 NLRB 720 (1960). This policy has been reaffirmed since Burns, supra. See Trans-American Video, 198 NLRB 1247 (1972); Great Atlantic & Pacific Tea Co., 197 NLRB 922 (1972). There is no evidence of any writing reflecting that the Employer adopted the IBEX/PATCO agreement.

2. Contract Bar Doctrine Applied to SERCO/PATCO Contract

I find that the SERCO/PATCO contract does not present a bar to the instant petition. The Employer and Union executed the agreement on April 22, and April 26, 2004, respectively. However, the contact explicitly states that the effective date of the agreement is June 1, 2004. Furthermore, there is no record evidence that the agreement actually went into effect prior to June 1. Thus, the May 24 petition was filed 6 days before the effective date of the SERCO/PATCO agreement covering the Tallahassee weather station.

I note that the petition was amended on June 2, 2004, after the June 1, 2004 effective date of the SERCO/PATCO agreement. It appears that the petition was

[7] Since the Service Contract Act requires a successor employer to honor the economic provisions of a predecessor's collective bargaining agreement, SERCO did so while negotiating a collective-bargaining agreement between itself and PATCO.

amended to include a unit description which was omitted from the original petition and the number of employees in the unit was changed from seven to six. Because the amended petition did not change the parties, and did not substantially change the character or size of the unit[8] or the number of employees covered, the original date of the petition of May 24 is controlling. National Broadcasting Co., supra, 104 NLRB 587.

3. Recognition Bar Doctrine

Although the issue of whether the petition is also barred by the recognition bar doctrine was not explicitly raised by the Union, the Employer addressed it anticipatorily at the hearing and in its brief. The Employer claims that application of the recognition bar doctrine would not bar the petition even though the Employer recognized the Union as evidenced by the parties' collective bargaining for a contract. However, as noted above, the Board has held that when a Burns successor recognizes the incumbent union that represented its predecessor's employees, such recognition will not serve as a bar to an otherwise valid petition. MV Transportation, supra; Southern Mouldings, Inc., 219 NLRB 119 (1975). Having concluded that the petition is valid for the reasons stated above, I find that, although the Union has a rebuttable presumption of continuing majority status in this Burns successorship situation and the Employer voluntarily recognized the Union, such recognition will not serve as a bar to this otherwise valid decertification petition.

III. STATUS OF SENIOR WEATHER OBSERVER

A. Case Law

Before examining the specific duties and authority of the senior weather observer (SWO), I will briefly review the requirements for establishing supervisory status. Section

[8] There is no contention that anyone was confused about the unit to which the original petition referred.

2(11) of the Act defines the term supervisor as "any individual having authority, in the interest of the employer, to hire, transfer, lay off, recall, promote, discharge, assign, reward or discipline other employees or responsibly direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." Thus, employees are statutory supervisors if: (1) they hold the authority to engage in any one of the specific criteria listed above; (2) their "exercise of such authority is not merely routine or clerical in nature, but requires the use of independent judgment;" and (3) their authority is held in the "interest of the employer." Kentucky River, 121 S. St. 1861, 1867 (2000); Harborside Health Care Inc., 330 NLRB 1334 (2000); Ohio Power Co. v. NLRB, 176 F. 2d 385 (6th Cir. 1949), cert. denied, 338 U.S. 899 (1949).

The burden of proving supervisory status lies with the party asserting that such status exists. Kentucky River, supra, at 1866; Michigan Masonic Home, 332 NLRB 1409 (2000). Lack of evidence is construed against the party asserting supervisory status. Michigan Masonic Home . Mere inferences or conclusionary statements without detailed, specific evidence of independent judgment are insufficient to establish supervisory authority. Sears, Roebuck & Co., 304 NLRB 193 (1991).

Designation of an individual as a supervisor by title in a job description or other documents is insufficient to confer supervisory status. Western Union Telegraph Company, 242 NLRB 825, 826 (1979). Moreover, the employer's directive or a job description setting forth supervisory authority also does not conclusively establish supervisory status. Bakersfield Californian, 316 NLRB 1211 (1995); Connecticut Light

& Power Co., 121 NLRB 768, 770 (1958). On the other hand, possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status even if this authority has not yet been exercised. See, e.g. Fred Meyer Alaska, 334 NLRB 646, 649, fn. 8 (2001); Pepsi-Cola Co., 327 NLRB 1062, 1063 (1999). The absence of evidence that such authority has been exercised may, however, be probative of whether such authority exists. See Michigan Masonic Home, supra, at 1410; Ten Broeck Commons, 320 NLRB 806 (1996). Thus, the question is whether the evidence demonstrates that the individual actually possesses any of the powers enumerated in Section 2(11). Western Union Telegraph Company, supra, at 826; North Miami Convalescent Home, 224 NLRB 1271 (1976).

B. The Parties' Treatment of the SWO

Under the predecessor's agreement with the Union, the SWO was a member of the bargaining unit. Article 1, Section 2 of the IBEX/PATCO agreement stated, "For the purpose of this Agreement, the term "employee" shall mean all employees, including but not limited to, full-time and part-time weather supervisors and weather observers in the bargaining units which the IBEX Group, has granted PATCO voluntary recognition or a unit has been certified by an appropriate government agency." Article 1, Recognition, Section 4 provided, "There shall be a full-time supervisor under this contract. The supervisor's pay will be in accordance with the rate attached in Appendix A." Under Appendix A, in the first year of the agreement, Senior Weather Observers were paid $4.14 more per hour than weather observers. IBEX paid the same amount into the Union's Health and Welfare funds for the SWO as for the other weather observers.

During negotiations for the SERCO/PATCO agreement, the Employer proposed excluding the SWO position from the bargaining unit, which the Union opposed. The parties ultimately included a wage rate and other provisions regarding the SWO in the agreement.[9]

Article 2, Sections 2 and 3, of the SERCO/PATCO agreement, on Union Recognition and Representation, provides as follows:

> Section 2. For the purpose of this agreement, the term "employee" shall mean all employees, at the Tallahassee Weather Station employed by Serco which includes the following job classifications:
>
> a) Weather Observer (CWO)
> b) Senior Weather Observer (Supervisor)
>
> Section 3. The parties expressly acknowledge and agree that the position of Senior Weather Observer is a supervisory/managerial position, and that the Senior Weather Observer shall exercise such supervisory authority in the best interest of the Employer. The parties also acknowledge that if evidence exists that indicates the Supervisor has not acted in the best interest of the company; the company may take action to rectify the situation with exception to Articles 10 and 11 of this agreement.

Articles 10 and 11 of the SERCO/PATCO agreement are the grievance procedure and the disciplinary action provisions, respectively. The parties stipulated that the intent of the language in Article 2 which refers to these provisions and to the SWO was that if the SWO did not act in the best interest of the company while performing "supervisory" duties, the SWO would not have the right to pursue a grievance regarding discipline received as a result of his conduct associated with these duties only. The SERCO/PATCO agreement does contemplate that the SWO would have a role in handling grievances.

---

[9] At the hearing, the Employer's attorney noted that, in the Employer's view, the parties reached no clear agreement in their negotiations as to whether or not the SWO belongs in the unit.

The SERCO/PATCO collective-bargaining agreement provides that the SWO is to earn $19.32 per hour, the same as he earned at IBEX, while other benefits are the same as those received by other weather observors.[10]

C. Overview of Senior Weather Observer Position

With regard to whether the SWO possesses any of the authority set forth in Section 2(11) of the Act, the record establishes that the SWO has not been involved in the layoff or recall of employees and fails to establish that the SWO has been involved in the promotion of employees or that he can effectively recommend such actions. Accordingly, after providing an overview of the SWO position, I will discuss the role of the SWO with regard to the remaining supervisory criteria. I will then address the role of the SWO in evaluating and training employees, the lack of on-site supervision, and the SWO's higher wages and job title.

Jeffrey F. Yarris, the Weather Contract Manager, was the only witness who testified with regard to the weather observer and SWO positions.[11] There are currently seven weather observers, including the SWO, who perform weather observation duties 24 hours a day at the Tallahassee weather station. Each weather observer is typically alone when he performs his work during 8-hour shifts. The record does not indicate how many employees are employed full-time versus part-time and how frequently they work a scheduled shift.

A weather observer is responsible for providing aviation weather observations for air traffic controllers and pilots who fly in and around the Tallahassee airport. This

[10] Yarris testified that ordinarily at other weather stations, the Employer pays SWOs only 10 to 15 percent more than other weather observers. Unlike the SWO, other weather observers in Tallahassee were to receive an immediate increase under the IBEX/SERCO agreement and another increase in October 2004.
[11] Yarris was also the contract manager involved in Case 12-RM-391, mentioned above in footnote 5.

includes reporting wind and ceiling heights, visibility, temperature, altimeter setting, and any changes to visibility. A weather observer would also include comments as to significant weather phenomena in the area, such as thunderstorms. A weather observer also visually observes the weather outside and inputs the data into ASOS, equipment that transmits the information to the aviation community at large.

The SWO has the additional responsibilities of being the Employer's on-site representative. The SWO is responsible for scheduling employees within the guidelines of the contract, adjusting schedules, transferring employees between shifts, and approving and disapproving leave. The SWO can schedule overtime if flight safety and continuity of the weather service is at issue. Yarris did not know if the Tallahassee's SWO's responsibilities have changed at all from those that existed during the IBEX contract. Further, he testified generally that authority was given to the SWO in verbal and written format, without explaining specifically what that authority was that was communicated to the SWO.

With respect to evaluations, Yarris testified that the SWO prepares a written report on the weather observer's job performance, including a quarterly evaluation on the technical aspects of the job and on weather observing ability. The SWO also completes annual written evaluations that cover the entire scope of any employee's work, including compliance with the company procedure, disciplinary problems, etc. It is noted that only one annual performance evaluation of an employee at the Tallahassee weather station and no quarterly evaluations were submitted into evidence.

The SWO also administers the random drug-testing program and is trained in the program so that he is aware and knowledgeable about the indicators of alcohol or drug

abuse and so that he can make a determination for suspect testing at the weather station. No evidence was presented that the SWO has actually ever ordered drug testing at the Tallahassee weather facility.

Yarris supervises all of the weather observers, including the SWO. Yarris has an office located in Murfreesboro, Tennessee. Yarris has spent a total of 12 hours at the Tallahassee weather station. As indicated above, in practice, all weather observers perform their work without on-site supervision during their shifts. The record does not reflect how much time the SWO spends performing his additional responsibilities.

The Employer offered no job description into evidence and did not call the SWO to testify.

D. Assignment of Work to Employees (Scheduling and Payroll)

The SWO has a role in scheduling and payroll. Regarding scheduling, the number of consecutive hours and days worked by weather observers is determined by the parameters set out in the Employer's Contract Weather Observation (CWO) contract with the FAA. The basic schedule, as defined in the SERCO/PATCO agreement, is the days of the week, hours of the day, rotation of shifts, and change in regular days off. The basic station schedule must satisfy the FAA coverage requirements. The SWO was not called to testify, thus there is no record of how the SWO goes about making the schedule, the period of time covered by the schedule, or how often it changes. However, it appears that the SWO has authority to change schedules within the constraints of company policy, the collective-bargaining agreement, and with agreement of the Union representative, if necessary. If two employees wanted to switch shifts, the SWO's involvement is limited by these same constraints. The senior weather observor may or may not report a change

in scheduling to Yarris after the fact; it depends on the impact and reason for the change, according to Yarris.

Although he testified that he was not privy to the procedure the Tallahassee SWO follows in granting vacation or time off and that it varies from weather station to weather station, Yarris described it in terms of the weather observers "coordinate[ing] with the supervisor." In his generic explanation, Yarris stated that when a weather observer requests normal scheduled days off, the SWO reviews the schedule to see if part-time employees can be scheduled to fill in for that period and/or finds another employee who will exchange shifts. If it gets to a point where the weather station is understaffed, the SWO can disapprove the request for time off, all without contacting Yarris. Yarris testified that he does not learn of vacations until the time sheets are received in the corporate office.[12]

Regarding payroll, Yarris testified that employees complete their time sheet on a daily basis and submit their time sheet to the SWO at the end of the pay period. The SWO then inputs that data into a computer program. If there are any discrepancies, the SWO will talk with the weather observer and try to rectify the situation. The SWO then signs off on each document and sends the information to the corporate office where the information is processed through the Employer's time and attendance computer program.

Based on the record before me, I find that the evidence concerning the authority of the SWO to prepare work schedules, make adjustments to the schedule, and to accommodate vacation schedules is insufficient to establish supervisory status. There is no indication that in approving the switching of shifts between employees on an isolated

[12] The transcript also reflects an attempted conclusionary stipulation, in which all parties did not join, that the SWO uses "independent judgment in scheduling and giving time off".

basis or moving an employee from one shift to another on a more extended basis, the SWO utilizes a significant amount of independent judgment, because it is not clear what criteria the SWO uses to decide who will work a particular shift. Specifically, the record does not reflect that there is any difference in skill level among the employees warranting use of independent discretion in making an assignment. To the extent that the SWO may occasionally adjust schedules due to vacations, this is insufficient to confer supervisory authority, particularly in light of the fact that when there are two conflicting vacation requests, the collective-bargaining agreement has provided strict guidelines, such as seniority, for who gets priority, leaving little discretion to the SWO. General Security Services Corporation, 326 NLRB 312 (1998).

I also find that the SWO's role in collecting and reviewing payroll information is insufficient to establish supervisory authority. The Board has held that the signing of timecards on a routine basis is insufficient to confer supervisory status. Electrical Specialties, Inc., 323 NLRB 705, 707 (1997). With respect to correcting time and attendance sheets, the record does not reflect (1) how often the SWO makes corrections; (2) that the corrections are anything other than routine; or (3) that any disciplinary action is taken against an employee for failing to correctly state their time based upon the SWO's corrections.

Based on the foregoing, I find that the senior weather observer does not exercise sufficient independent judgment in assigning work to employees or in performing payroll functions to establish supervisory status.

E. Hiring

Yarris testified, in general terms, about the Employer's hiring process. At its headquarters, the Employer collects applications for employment at weather stations nationally. When a SWO reports to Yarris or the Human Resources Department about an upcoming vacancy, the Human Resources Department will send resumes or applications of the top three or four weather observers to the weather station. Yarris testified that the SWO then interviews the prospective employees, determines which one is the best candidate for the job, and informs Yarris of his choice. However, there is no specific evidence in the record that the Employer ever advised the SWO at the Tallahassee weather station (or any other facility) that he possesses such authority in the hiring process. Yarris further testified that he would not review the applicants and would go along with the SWO's judgment.[13] The chosen applicant would go through the new hire process and all the paperwork would be prepared out of the support office in Tennessee. However, Yarris also testified that the SWO at the Tallahassee weather station has not been involved in any hiring or recommendations regarding hiring and that there have been no new hires since SERCO took over operations of the weather station.

I find that the record fails to establish that the SWO at the Tallahassee weather station hires employees or effectively recommends the hiring of employees. As stated above, Yarris confirmed that no hiring has been done at Tallahassee. The absence of evidence that such authority has been exercised is of probative value. See Michigan Masonic Home, supra, at 1410, and Ten Broeck Commons, supra. Additionally, there is no evidence that the SWO has ever been advised of any authority in the Employer's

[13] The decision in Case 12-RM-391 reflects that Yarris conducted second interviews of applicants for hire in Ft. Lauderdale.

hiring process. See Parma Water Lifter Co., 102 NLRB 198, 202-203 (1953), enfd, 211 F.2d 258 (9th Cir. 1953), cert. denied 348 U.S. 829 (1954) (the intention of an employer to confer supervisory authority upon an employee is insufficient absent a clear announcement by him to said employee of such authority). Further, this record contains no evidence as to how the process actually works at other weather stations. Moreover, even in the process described by Yarris, the Human Resource Department has a significant role. The mere involvement in interviewing and/or hiring applicants, when others are involved in that process, does not necessarily dictate a finding of supervisory status. Legal Aid Society of Alameda County, 324 NLRB 796, 797 (1997).

Accordingly, I find that the record fails to establish that the SWO hires employees, or effectively recommends their hiring, using sufficient independent judgment to confer supervisory status.

F. Discipline and Discharge

There is no evidence that any employee has been disciplined or discharged for drug use or for any other reason at the Tallahassee weather station. However, the employer contends that the SWO can independently discharge an employee, but only for a positive drug test result. Once again, Contract Manager Yarris testified generally with regard to the Employer's drug testing policy. He testified that the SWO received training in the Employer's drug testing program and that if a SWO detects signs that a weather observer may be under the influence, he ensures that the employee's shift is covered and then sends the employee to the drug testing facility. It appears that if an employee tests

positive, the Tallahassee SWO then would discharge the employee.[14] Yarris testified that he would be informed of the discharge after the fact.

In addition to the authority to discharge weather observers for testing positive for drug or alcohol use, the Employer maintains that the SWO also has authority to discipline employees up to and including suspension for other reasons as well. However, as indicated above, Yarris testified that the Tallahassee SWO has never disciplined an employee. Likewise, there is no evidence in the record demonstrating that the SWO in Tallahassee has recommended discipline.

The Employer has a progressive discipline policy and the Employer claims that the SWO is to keep Yarris informed of all the disciplinary problems. Yarris testified that, if the SWO recommended that an employee be discharged for having committed a severe offense such as assaulting another employee, other than a positive drug test, Yarris would give that recommendation significant weight and would only conduct an independent investigation if the SWO asked him to do so. The SWO would not be able to discharge the person who committed the assault without first consulting with Yarris. However, other than issuing discipline for testing positive for drug use and for assaulting another employee, the record is void of any other types of disciplinary matters in which the SWO would be involved. Moreover, there is no record evidence that the Employer specifically informed the SWO that he has the authority to issue discipline. Parma Water Lifter Co., supra, 102 NLRB at 202-203.

Based upon the above, there is insufficient evidence that the SWO has the authority to discipline or discharge employees or to effectively recommend same.

---

[14] At the hearing, the parties attempted an incomplete stipulation to this effect.

See Michigan Masonic Home, supra, at 1410, Ten Broeck Common, supra.[15]

G. Direction of Employees

There is no record evidence which specifically explains how the SWO interacts with the other weather observers. The weather observers, as well as the SWO, perform their work independently of each other.

According to the employee performance evaluation report that is in evidence, the role of a weather observor is to maintain a weather observation watch in accordance with FAA order 7900.5B, and to read, compute and record meteorological observations using ASOS. In times of ASOS outage, the employee is to recognize meteorological phenomena and types of precipitation. The employee encodes and transmits weather observations over available means. The employee is to acquire weather data via available means, including the Internet and pilot reports. The employee also performs meteorological comparisons for accuracy of recording equipment. The employee's duties also include preparing for submission and maintaining weather and climatological records. There is no specific evidence as to how the SWO at the Tallahassee weather station responsibly directs or uses independent judgment in supervising the weather observers in the performance of their duties.

Based on the foregoing, I find that the SWO does not responsibly direct employees using independent judgment so as to establish supervisory status.

H. Training and Evaluating Employees

The Employer claims in its brief that the SWO trains employees, reviews their weather observation work on a daily basis, and ensures that the weather observers are

[15] With respect to discharges for positive drug tests, if a positive test dictates discharge, it appears no independent judgment is involved in determining that such a discharge should occur.

doing their jobs correctly. The record does not provide specific evidence regarding the type of training, the source of the training, or the frequency of training that the SWO provides to weather observers, nor the amount of time spent by the SWO in observing weather observers perform work.[16]

With regard to evaluations, the SWO conducts quarterly evaluations of the employees' weather observations skills and annual performance evaluations. Yarris testified that he assisted the SWO at the Tallahassee weather facility in the preparation of an annual evaluation of one employee in January 2004 by discussing the philosophy behind the evaluation and the company guidelines in the preparation of the document. Other than that, the SWO completed the evaluation form without assistance from Yarris.

I find that the SWO's authority to evaluate employees is insufficient to establish supervisory authority. The authority to train or evaluate employees is not one of the enumerated criteria for determining supervisory status. The Board has held that supervisory status is not necessarily conferred by training and monitoring, and the Board takes into account whether the individual in question selects employees to perform work based upon a judgment of employees' skills obtained from observations of their work. Byers Engineering Corp., 324 NLRB 740, 741 (1997). With respect to evaluations, unless the evaluations are directly linked to a wage increase, or in some other way affect the employee's employment status, such authority is not deemed supervisory authority. Williamette Industries, Inc. 336 NLRB 743 (2001), Hausner Hard-Chrome of KY, Inc., 326 NLRB 426, 427 (1998).

[16] In fact, since weather observers, including the SWO, work alone, it would appear that very little time is spent by the SWO in observing weather observers.

The Employer also contends that these evaluations serve as the basis for approving or disapproving an employee for promotion and/or transfer. As an example, Yarris stated that in the case of a transfer from one airport to another, the SWOs at the two affected airports would discuss it among themselves and make a recommendation to Yarris about the transfer. Yarris said that he would support that recommendation unless there was something that they did not consider. There is no evidence that the SWO at Tallahassee has ever been involved in a transfer.

Also, under the SERCO/PATCO agreement, employees who wish to transfer to another facility submit their requests in writing to the Human Resources Department. Then, in filling vacancies, employees with transfer requests on file will receive priority consideration over new hires. If there are two equally qualified employees who have applied for a transfer to the same station, unless unusual circumstances exist, the most senior employee will be offered the transfer. Thus, at least under the terms of that contract, there is no indication that the SWO would decide a transfer issue based on his evaluations of employees.

Accordingly, I find that the SWO's role in training and evaluating employees is insufficient to establish supervisory status.

I. Resolution of Grievances

Again, Yarris testified generally about the SWO's potential role in resolving grievances. In this regard, Yarris testified that the SWO must advise Yarris of all grievances, but that the SWO may resolve grievances without first obtaining Yarris' approval. However, there is no evidence that the SWO at Tallahassee has ever been involved in a grievance, even a minor grievance, and Yarris' conclusionary testimony on

this subject was never factually developed. Furthermore, there is no specific record evidence that the Employer has ever advised the SWO that he has the authority to resolve grievances on the Employer's behalf. Parma Water Lifter Co., supra, 102 NLRB at 202-203.

Although there was a proposed stipulation echoing Yarris' conclusion that the SWO could resolve grievances without advising Yarris in advance, I note that the Employer did not enter into the stipulation. Furthermore, such a conclusion is not factually supported by the record since, as mentioned above, the evidence does not establish that the SWO in Tallahassee has resolved any grievances at any time.[17] No examples of "grievances" or explanation of the limits on the SWO's authority are included in the record.

Based on the conclusionary evidence in the record, I am unable to conclude that the SWO has the authority to resolve grievances using independent judgment within the meaning of the Act.

J. Secondary Indicia of Supervisory Status

The SWO is the only person on-site who is referred to as a supervisor. The SWO receives higher pay than other weather observers, but receives the same benefits. According to the SERCO/PATCO agreement, the SWO performs weather observation duties as scheduled by the company, but there is no evidence of how much time is allocated to working as a weather observer and how much time is allocated to his other duties. As noted previously, the weather observers are scheduled to work alone.

[17] However, as noted previously, the SERCO/PATCO contract contemplates that the SWO would be involved in handling grievances. But the contract also appears to contemplate that the SWO could file a grievance on his own behalf.

At the outset, it should be noted that secondary indicia of supervisory status are not determinative of supervisory authority under the Act. General Security services, 326 NLRB at 312; Juniper Industries, Inc., 311 NLRB 109, 110 (1993). With respect to on-site supervision, the Board has rejected arguments that there must be a supervisor in every workplace. VIP Health Services, Inc., 164 F.3d 644 (D.C. Cir. 1999). Moreover, the absence of an employee with authority under Section 2(11) of the Act does not confer supervisory status on the highest ranking individual at the workplace. VIP Heath Services, supra, at 2273; See also NLRB v. KDFW-TV, Inc., 790 F. 2d 1273, 1279 (5th Cir. 1986).

Although the IBEX/PATCO and the SERCO/PATCO contracts refer to the senior weather observer as "a supervisor", supervisory status is determined by job duties rather than title or classification. MJ Metal Products, Inc., 325 NLRB 240, 241 (1997); John N. Hansen Co., 293 NLRB 63, 64 (1989) (title of warehouse supervisor insufficient to confer supervisory status when warehouse supervisor was merely a conduit for relaying management instructions regarding routine tasks); Winco Petroleum Co., 241 NLRB 1118, 1121-1122 (1979) (title or theoretical power to perform supervisory function not determinative in the absence of actual supervisory status).

The SWO's hourly rate under the SERCO/PATCO agreement is higher than other weather observers, as it was under the IBEX contract. A difference in terms and conditions of employment is a secondary indicator of supervisor status. North Shore Weeklies, Inc., 317 NLRB 1128 (1995). However, given that the senior weather observer performs the same work as the other weather observers, and earns the same rate of pay as when he was employed by IBEX, his higher wage for performing additional

routine tasks is insufficient to confer supervisory status. Cf. Service Employees International Union, 322 NLRB 402, 404-405 (1996) (employees who determined particular assignments for employees, disciplined, employed, and received higher wages for their increased technical skills found statutory supervisors).

Accordingly, I find that the above-described secondary indicia of supervisory status are insufficient to establish supervisory authority.

K. Conclusion on the Supervisory Issue

In sum, the Employer has failed to meet its burden of establishing that the SWO is a statutory supervisor. The Employer relies almost exclusively upon the testimony of its Weather Contract Manager who has spent a scant 12 hours at the Tallahassee weather station. The testimony elicited from this witness was general and conclusionary and almost wholly unsupported by documentary evidence. That testimony fails to show that the SWO has exercised supervisory authority or been informed specifically that he has statutory supervisory authority. The Employer requests that I conclude that a position that has historically been a bargaining unit position be excluded from the unit as a supervisory one, even though the individual in question generally works alone, and the small number of his apparently highly skilled fellow employees likewise generally work alone. I am also asked to reach the conclusion in the face of a recent representation case involving this same Employer, same Union, and same contract manager, in which I concluded that another SWO working under the same kind of conditions is not a statutory supervisor. The Board denied the request for review in that other case. In these circumstances, I am unable to conclude that the Tallahassee SWO is a statutory supervisor.

IV. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.[18]

3. The Union claims to represent certain employees of the Employer.[19]

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c) and Section 2(6) and 2(7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective-bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and part-time weather observers and senior weather observers employed by the Employer at its Tallahassee, Florida Weather Station.
Excluded: All other employees, including confidential employees, guards and supervisors as defined by the Act.

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by

---

[18] The Employer, with headquarters in Murfreesboro, Tennessee, incorporated in the State of Tennessee and authorized to do business in the State of Florida, with a facility located in Tallahassee, Florida, is engaged in providing weather observation and air traffic control services to the FAA. During the past twelve (12) months, in conducting its business operations, the Employer derived gross revenues in excess of $500,000 and during that same time period, purchased services valued in excess of $50,000, which were furnished to the Employer at its Florida facilities, directly from points located outside the State of Florida.

[19] At the hearing, the parties stipulated that the Union is a labor organization within the meaning of Section 2(5) of the Act.

PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION (PATCO) FPD, NUHHCE, AFSCME, AFL-CIO. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike that began less than 12 months before the election date, employees engaged in such a strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have

access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters.[20] North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type and clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized. Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, 201 Kennedy Blvd., Suite 530, Tampa, Florida 33602, on or before September 8, 2004. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (813) 228-2874. If you have any questions, please contract the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of three full working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections

[20] If the list is submitted in hard copy form, three copies should be submitted.

to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. This request must be received by the Board in Washington by 5:00 p.m., EST on September 15, 2004. The request may not be filed by facsimile.

DATED at Tampa, Florida, this 1st day of September, 2004.

/s/[Rochelle Kentov]
Rochelle Kentov, Regional Director
National Labor Relations Board, Region 12
201 E. Kennedy Boulevard, Suite 530
Tampa, Florida 33602